

Supreme Court of the United States

OCTOBER TERM, 1969

No. 179

WILLIAM P. ROGERS, SECRETARY OF STATE
OF THE UNITED STATES OF AMERICA,

Appellant,

—v.—

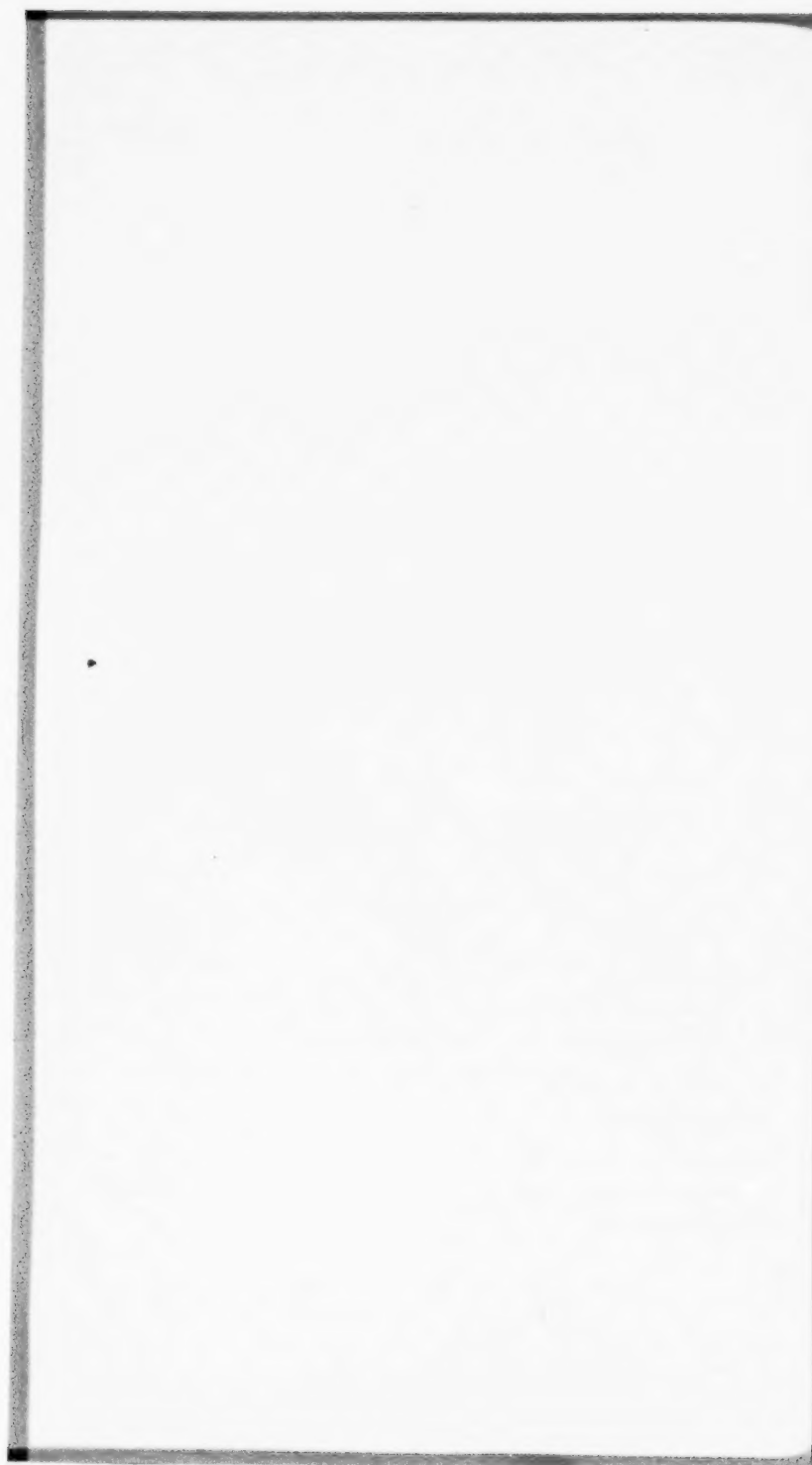
ALDO MARIO BELLEI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DISTRICT COURT

CHRONOLOGICAL LIST OF IMPORTANT PROCEEDINGS
AND DATES

Date	Proceedings
3-24-67	(1) Complaint filed in U. S. District Court for the Southern District of New York
8- 9-67	(2) Plaintiff's motion for a three-judge court, affidavit and memorandum of law in support of motion filed
10- 2-67	(3) Affidavit in opposition to plaintiff's motion to convene three-judge court and memorandum of law in opposition filed
10- 3-67	(4) Reply affidavit in support of motion for a three-judge court and memoranda of law in support thereof filed
11- 2-67	(5) Opinion of Court filed
11-16-67	(6) Order of Court filed denying motion to convene three-judge court, without prejudice, and transferring case to United States District Court for the District of Columbia
1- 8-68	(7) Plaintiff's motion for a three-judge court, affidavit and memorandum of law in support thereof filed
3-21-68	(8) Defendant's response to plaintiff's motion for three-judge court filed
3-26-68	(9) Plaintiff's motion for summary judgment and memorandum of law in support thereof filed
3-28-68	(10) Stipulation of facts filed
4- 3-68	(11) Defendant's motion for summary judgment and memorandum in support thereof filed
4- 8-68	(12) Request for designation of three-judge court filed

Date	Proceedings
4- 8-68	(13) Designation of judges to serve
4-17-68	(14) Plaintiff's reply memorandum in support of his motion for summary judgment filed
4-23-68	(15) Defendant's reply brief filed
2-28-69	(16) Memorandum opinion and concurring opinion filed
5-22-69	(17) Judgment filed
5-23-69	(18) Notice of Appeal filed
5-23-69	(19) Order directing transmittal of all original papers to Clerk, U. S. Supreme Court filed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civil 1166

ALDO MARIO BELLEI, PLAINTIFF

—against—

DEAN RUSK, Secretary of State
of the United States of America, DEFENDANT

COMPLAINT FOR INJUNCTION, DECLARATORY
JUDGMENT, AND OTHER RELIEF

Plaintiff, by his lawyers O. John Rogge, Henry Mark Holzer, and Phyllis Tate Holzer, complaining of defendant, allege that:

1. Jurisdiction of this Court exists because of diversity of citizenship, because the question involved here arises under the Constitution and laws of the United States, and because the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs.
2. Jurisdiction of this Court also exists under Section 360(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1503(a), (hereinafter referred to as the "Act").
3. Jurisdiction of this Court also exists under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, as implemented by the Declaratory Judgment Act, 28 U.S.C. § 2201.
4. Defendant is Secretary of State of the United States of America, having been duly nominated, confirmed, and sworn into said position.
5. At the time of plaintiff's birth, outside the geographical limits of the United States and its outlying possessions, his father was an alien.
6. However, his mother was a citizen of the United States who, prior to plaintiff's birth, was physically present in the United States for a period or periods totaling

not less than ten years, at least five of which years were after attaining the age of fourteen years.

7. Thus under the Act, plaintiff was a native United States citizen.

8. At no time prior to February 12, 1964 had plaintiff been continuously physically present in the United States for at least five years.

9. On or about February 12, 1964 the Department of State held that plaintiff's native American citizenship had been revoked because, as required by Section 301(b) of the Act, he had never been continuously physically present in the United States for at least five years.

10. Upon information and belief defendant authorized, ordered, and ratified the revocation of plaintiff's citizenship.

11. As a result, plaintiff has suffered and will continue to suffer irreparable injury, including but not limited to being denied the precious right of being an American, the ability to possess and travel on an American passport, and to enjoy American diplomatic protection.

12. Defendant's action of purportedly revoking plaintiff's native citizenship was based on Section 301(b) of the Act.

13. Section 301(b), and the alleged revocation of plaintiff's native citizenship, unconstitutionally violates:

- (a) the Due Process clause of the Fifth Amendment,
- (b) the Cruel and Unusual Punishment clause of the Eighth Amendment,
- (c) the Ninth Amendment.

WHEREFORE, plaintiff requests that:

(a) a three-judge court be convened in accordance with 28 U.S.C. §§ 2282, 2284,

(b) that said court permanently enjoin defendant and his successors and subordinates from carrying out or otherwise enforcing Section 301(b) of the Act,

(c) that said court render a declaratory judgment that section 301(b) of the Act is unconstitutional,

(d) that said court render a declaratory judgment that plaintiff is still, and has never ceased being, a native American citizen,

(e) that said court grant such other and further relief as may be just, including but not limited to expunging all records wherein it is indicated that plaintiff's citizenship had been revoked.

/s/ O. John Rogge
O. JOHN ROGGE
HENRY MARK HOLZER
PHYLLIS TATE HOLZER
Lawyers for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

STIPULATION OF FACTS

1. Plaintiff was born at Ancona, Italy on December 22, 1939. His father, Crescenzo Bellei, was then and always has been a citizen of Italy and was never a citizen of the United States. His mother, Theresa Lola Bellei, nee Cesaretti, was born in Philadelphia, Pennsylvania on March 14, 1915 and resided in the United States until March 23, 1939. When she was 24 years old, she went to Italy to live with her husband, whom she had married in Philadelphia, Pennsylvania on March 14, 1939. At the time of plaintiff's birth his mother was, and always has been, a citizen of the United States.
2. Plaintiff acquired Italian citizenship at the time of his birth in Italy and has retained his Italian citizenship since then. He also acquired United States citizenship at the time of his birth, under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797.
3. Plaintiff has resided in Italy from the time of his birth until recently, except that he was physically present

in the United States from April 27, 1948 to July 31, 1948, from July 10, 1951 to October 5, 1951, from June of 1955 until October of 1955, from December 18, 1962 to February 13, 1963, and from May 26, 1965 to June 13, 1965. On the first two such occasions, plaintiff came to the United States on his mother's passport. She was in possession of a United States passport, and was admitted to the United States with her children as citizens of this country. On the next two such occasions, he came to the United States on his own United States passport, and was admitted to the United States as a citizen of this country.

4. Plaintiff was first issued his own United States passport on June 27, 1952. Thereafter, his passport was periodically renewed up to and including December 22, 1962, his twenty-third birthday. His application for a passport approved on August 1, 1961 contains the following notation "Warned abt. 301(b)".

5. On January 14, 1963, while he was in the United States, plaintiff applied for another passport, stating in his application that he resided in Havertown, Pennsylvania, that he was a student, that he intended to depart from the United States in February 1963 and to remain abroad 3 months, and that he was going to Italy to complete his studies. The application was granted, but the validity of his passport was limited to July 21, 1963. At the time of the issuance of this passport the Department of State sent plaintiff a letter dated January 22, 1963, copy of which is annexed and incorporated herein as Exhibit "1".

6. On July 18, 1963, plaintiff applied in Rome, Italy for an extension of his passport, alleging that he intended to return to the United States to reside permanently within 7 months. In specifying the purpose of the requested extension the application stated: "I have resided since my birth in Italy to reside with my parents and for studies. I last left for the U.S. on Dec. 18, 1962 and have returned to Italy on Feb. 13, 1963 to complete my studies." On November 20, 1963 plaintiff was notified that his passport was extended until February 11, 1964, but that if he remained in Italy beyond February 11,

1964 he would lose his United States citizenship under Section 301(b) of the Immigration and Nationality Act. Copies of that communication and its translation are annexed and incorporated herein as Exhibit "2".

7. Following plaintiff's failure to return to the United States prior to February 11, 1964 the Department of State concluded that he had lost his United States citizenship under Section 301(b) of the Immigration and Nationality Act, as amended, and he was orally informed of this conclusion by the American Embassy at Rome, Italy.

8. Thereafter plaintiff made a number of inquiries at the United States Consulate in Rome concerning the revocation of his passport. The United States Consulate in Rome advised him that his passport had been revoked, and that there was no way in which he could have it reinstated; but that he could obtain an Immigration Visa for himself and his wife under an immigration quota reserved to married sons and daughters of United States citizens. Accordingly, plaintiff applied for admission to the United States as an alien on May 18, 1965. He was admitted at that time as an alien visitor for pleasure authorized to remain until August 30, 1965. Thus he came to the United States on May 26, 1965 with an Italian Passport. He came with his bride to visit his grandparents on his mother's side. He departed with his bride from the United States to Canada on June 13, 1965.

9. In 1966 plaintiff again applied to the American Consul at Rome, Italy for an American passport. He was notified on November 29, 1966 that his application for a passport was denied on the ground that he had lost his United States citizenship under Section 301(b) of the Immigration and Nationality Act, as amended. Copy of that notification is attached and incorporated herein as Exhibit "3".

10. Plaintiff is currently employed by Nadgeco Ltd., Nadgeco House, The Center, Feltham, United Kingdom, as an electronics engineer. Nadgeco Ltd. is an organization engaged in the NATO defense program.

11. Plaintiff currently resides with his wife at 22 Mulberry Trees, Russell Road, Shepperton, Middlesex, United Kingdom.

12. On March 28, 1960 plaintiff registered under the Selective Service laws of the United States with the American Consul in Rome, Italy. He was asked to report for physical examination and passed such examination by the U.S. Army at Leghorn, Italy. On December 11, 1963 he was asked to report for induction at Washington, D.C., but his induction was deferred because he was employed on a NATO defense program. At that time he was again warned of the danger of losing his United States citizenship if he did not comply with the requirement of establishing residence in the United States. After February 14, 1964 he received a letter from the United States Selective Service explaining that due to loss of his United States Citizenship he had no further obligations for military service on behalf of the United States.

Dated: March 7, 1968.

/s/ O. John Rogge
O. JOHN ROGGE
FREEDMAN, LEVY, KROLL &
SIMONDS
Attorneys for Plaintiff

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney
Attorneys for Defendant

Of Counsel:

/s/ Charles Gordon
CHARLES GORDON
General Counsel
Immigration and Naturalization Service

EXHIBIT 1

DEPARTMENT OF STATE
WASHINGTON

[Emblem]

January 22, 1963

In reply refer to
PASSPORT OFFICE

PT/DA-130-Bellei, Aldo Mario

Mr. Aldo Mario Bellei
c/o Mannella
545 Harrington Road
Havertown, Pennsylvania

In the interest of protecting your United States citizenship the validity of your passport has been limited.

Your attention is called to the enclosed pamphlet concerning the acquisition and retention of citizenship, particularly subsections (b) and (c) of Section 301 of the Immigration and Nationality Act of 1952, and also Section 16 of the Act of September 11, 1957 which is set forth at the bottom of page two.

/s/ Frances Knight
FRANCES G. KNIGHT
Director, Passport Office

Enclosure:

Pamphlet
Passports (2)

EXHIBIT 2

Ambasciata Americana,
Sezione Consolare,
Roma, 20 novembre 1963.

Signor Aldo M. Bellei,
Via Ugo Balzani 8,
Roma.

La competente autorita' degli Stati Uniti ha autorizzato questa Ambasciata ad estendere il Suo passaporto sino all'11 febbraio 1964, data in cui dovra' trovarsi negli Stati Uniti per rimanervi ininterrottamente sino al 18 dicembre 1967.

Rimanendo in Italia oltre l'11 febbraio 1964, perdera' ogni diritto alla cittadinanza ai sensi della Sezione 301 (b) della Legge Americana sulla Nazionalita' ed Immigrazione del 1952.

Distinti saluti.

Firmato: EVERETT L. DAMRON
Console americano

EXHIBIT 2
TRANSLATION

Mr. Aldo M. Bellei,
Via Ugo Balzani 8,
Rome.

Competent United States authorities have authorized this office to extend your passport until Feb. 11, 1964. You should be residing in the United States on that date and remain there continuously until December 18, 1967.

If you remain in Italy beyond February 11, 1964, you will lose United States citizenship under Sec. 301(b) of the Immigration and Nationality Act.

Signed: EVERETT L. DAMRON
American Consul

rrl

EXHIBIT 3

November 29, 1966

Mr. Aldo Maria Bellei
Via U. Balzani No. 8
Rome, Italy

Dear Mr. Bellei:

In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on September 1, 1964 in which the Department held that you had lost American nationality as of February 12, 1964 by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

Sincerely yours,

/s/ Everett L. Damron
EVERETT L. DAMRON
American Consul

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Upon the complaint and stipulation of facts heretofore filed herein, and upon all prior proceedings had herein, plaintiff, by his attorney, O. John Rogge, moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in favor of plaintiff and against defendant, for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law, and for such other and further relief as to the Court may seem just and proper.

Dated: March 26, 1968

/s/ O. John Rogge
O. JOHN ROGGE

/s/ Milton P. Kroll
MILTON P. KROLL
Attorneys for Plaintiff

TO:

DAVID G. BRESS
United States Attorney

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Defendant Secretary of State by his attorney, the United States Attorney for the District of Columbia, moves the Court for summary judgment in his favor on the ground that there is no issue as to any material fact, and defendant is entitled to judgment as a matter of law.

Defendant refers, in support hereof, to the "Stipulation of Facts" filed in this cause on March 21, 1968. A memorandum of points and authorities (styled "Brief in Support of Defendant's Motion for Summary Judgment") is herewith submitted.

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

Of Counsel:

CHARLES GORDON
General Counsel
Immigration and Naturalization Service

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3002-67

ALDO MARIO BELLEI, PLAINTIFF

v.

DEAN RUSK, Secretary of State
of the United States of America, DEFENDANT

OPINION

Messrs. Milton P. Kroll and Michael I. Smith for plaintiffs.

Messrs. David G. Bress, United States Attorney, Joseph M. Hannon, Assistant United States Attorney and Gil Zimmerman, Assistant United States Attorney, for defendants.

Before WRIGHT and LEVENTHAL, Circuit Judges, and SMITH, District Judge.

LEVENTHAL, Circuit Judge: Plaintiff, Aldo Mario Bellei, is a citizen of the United States by virtue of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section confers American citizenship on children born of at least one American parent, even though such child is born outside of the United States.¹ Plaintiff brought this action against the Secretary of State to enjoin enforcement of section 301(b) of the 1952 Act, which if operative would terminate his Ameri-

¹ 8 U.S.C. § 1401(a)(7), as amended (Supp. III, 1968):

(a) The following shall be nationals and citizens of the United States at birth:

....

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period of periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years

can citizenship. Subsection (b) of § 301 places a limitation on the grant of citizenship made by section 301 (a) (7) by making retention of American citizenship conditional upon completing a term of five years residence in the United States before age twenty-eight.² We hold that this section violates the requirements of the due process clause of the Fifth Amendment.

I

The pertinent facts have been stipulated. Plaintiff was born in Italy in December, 1939, of an Italian-born father and an American-born mother. Plaintiff's parents have always been and continue to be citizens of their respective native lands.

Plaintiff, from birth, has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed

² 8 U.S.C. § 1401(b) (1964). This provision requires that such child spend at least five years in this country between the ages of fourteen and twenty-eight:

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The "continuous" presence requirement of section 1401(b) was liberalized in 1957, 71 Stat. 644 (1957), 8 U.S.C. 1401b (1964):

for ~~In the administration of section 1401(b) of this title, absences from the United States of less than twelve months in the aggregate, during the period~~ ~~which~~ continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence.

When Congress originally included this requirement in 1934, it required five years residence before the child reached age eighteen. *See* 48 Stat. 797. The 1940 reenactment was more generous, *see* 54 Stat. 1138-39, and the present law is even less strict, allowing the child until age twenty-eight to complete his five years of residence.

himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.³

This controversy arises out of the State Department's refusal to extend or renew plaintiff's passport. When plaintiff sought to have his passport renewed in 1964, the Department denied his request. In 1961 the passport renewal office had noted on plaintiff's passport, "Warned abt. 301(b)." Plaintiff, after that warning, sought renewal in January, 1963, stating in his application that he resided in Havertown, Pennsylvania, giving his occupation as student, and indicating that he intended to remain abroad only three months. His application was granted, but the passport was validated only through July, 1963. At the time of this renewal plaintiff was twenty-three years old.

In July, 1963, plaintiff applied through the United States Embassy in Italy for a further extension. Again his request was honored, but he was reminded that he would no longer be considered a citizen, in view of section 301(b), if he remained abroad. The extension expired as of February 11, 1964. When plaintiff failed to return to this country prior to that date, the Department of State concluded that he was no longer a United States citizen, and he was orally informed of that conclusion by the American Embassy at Rome. His passport was accordingly deemed revoked. On February 14, plaintiff was also notified by the United States Selective Service that his liability for military service had terminated in view of his loss of citizenship. At that time plaintiff was over twenty-four years of age. Since 1964, plaintiff has again applied for an American passport and

³ His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

has had his request turned down by a formal letter from the American consul in Italy.⁴

Plaintiff contends that enforcement of section 301(b) is contrary to the Fifth, Eighth, and Ninth Amendments to the Constitution. A three-judge court has been convened since the constitutionality of a federal law is drawn into question by this litigation.⁵

II

Plaintiff contends that section 301(b) operates to strip a citizen of his citizenship and rests his case primarily on the pillar of due process which has become a bulwark for the protection of citizenship in recent Supreme Court decisions. See *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964). While the facts of both cases are distinguishable, we think the *Afroyim* and *Schneider* opinions do stand for the proposition that in the absence of fraud Congress may not withdraw a citizenship, whether acquired at birth or by subsequent grant, that is not voluntarily renounced.⁶ The position urged by the Government would require us to accord a "niggardly" reading that we think is incompatible with the broad and forceful position put forward by the Supreme Court to protect an important constitutional right. Cf. *Ullman v. United States*, 350 U.S. 422, 426 (1956).

⁴ We reproduce here the letter from the American consul:

In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on September 1, 1964, in which the Department held that you had lost American nationality as of February 12, 1964, by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

⁵ 28 U.S.C. § 2282 (1964).

⁶ The exception for the person who has acquired his citizenship by fraud is noted in *Afroyim v. Rusk*, 387 U.S. 253, 267 n. 23 (1967).

We turn first to *Schneider v. Rusk*, *supra*.⁷ That case involved a statutory provision which provided:

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act. . . . Section 352, Immigration and Nationality Act of 1952, 66 Stat. 163, 269, 8 U.S.C. §§ 1101, 1484.

In holding that Congress could not constitutionally restrict the freedom of naturalized citizens to reside abroad in their native lands the Court said:

A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons. 377 U.S. at 168-69.⁸

The Supreme Court's broad approach emerged even more clearly with *Afroyim v. Rusk*,⁹ where the Court held that Congress could not take away citizenship from one who has not voluntarily relinquished it. The signifi-

⁷ 377 U.S. 163 (1964).

⁸ Compare the 1940 enactment, 54 Stat. 1139, of what is now section 301, dropped over protest in 1952 (*see* 98 Cong.Rec. 5785 82d Cong., 2d Sess. 1952), providing specially for children whose American parent was engaged abroad on American-related business.

⁹ 387 U.S. 253 (1967).

cance of *Afroyim* is illuminated by the fact that previously, following *Perez v. Brownell*, 356 U.S. 44 (1958), the Court had, in Justice Black's words "consistently invalidated on a case-by-case basis various other statutory provisions providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship." In *Afroyim* the Court overruled *Perez*, discarded the case-by-case approach, and sounded a general theme that was contrary to the previously stated assumption that Congress had the power to expatriate citizens in certain circumstances.

Citizenship is no light trifle. . . . The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. 387 U.S. at 267-68. (Emphasis added.)

Section 301(a)(7) by its terms confers citizenship at birth.¹⁰ Persons in plaintiff's situation are endowed at

¹⁰ The predecessor to section 301, § 1993 Revised Statutes, left open the question of whether the child beneficiary acquired citizenship at birth, or only upon compliance with conditions of declaring an intention to become a resident and taking an oath of allegiance required by section 6, Act of March 12, 1907, 34 Stat. 1228, 1229. The 1939 Act substituted the requirement of presence in the United States which is the forerunner of subsection (b). While the floor debates on the 1934 Act suggested that it was necessary to comply with the requirements of residence before citizenship could attach, the Attorney General in a contemporaneous construction concluded that the Act conferred citizenship at birth. See 38 Ops. Att'y. Gen'l. 10, 16-18 (1934); see also *Weedin v. Chin Bow*, 274 U.S. 657, 675 (1927), concluding, by implication, that the benefit of citizenship under the 1855 Act attached at birth.

birth with American citizenship and all its incidents and they enjoy its benefits during their formative years. The provisions of subsection (b) would operate to terminate the citizenship status for those persons, previously recognized as citizens, who do not take the steps set forth in (b). While plaintiff did not take up residence in this country in 1963, as provided by section 301(b), he had declared his intention to do so. During this period of citizenship, he was subject to American jurisdiction as a citizen¹¹ and also subject to other duties of citizenship such as military service. Now he is independent of youthful ties to family and wants to come to the United States. In view of the prior grant of citizenship to plaintiff we do not think Congress can now slam the door in his face. Whatever the reason plaintiff remained abroad, family ties or schooling, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his "rights to live and work abroad in a way that other citizens may." This is contrary to *Schneider* and *Afroyim*.

III

The Government relies on the fact that *Schneider* and *Afroyim* protected plaintiffs who traced their citizenship to naturalization. It is argued that the Fourteenth Amendment's due process clause guards only that citizenship that is constitutionally conferred, citizenship acquired by birth in the United States or by naturalization, and is inapplicable to citizenship conferred by a statute that is not an act of naturalization. We see no basis for the distinction. It may be that there is more than one Constitutional source of Congressional authority to grant and define citizenship, that there is power deriving from the naturalization clause, Act I, § 8, cl. 4, and also authority¹² deriving from implied powers of

¹¹ *Blackmer v. United States*, 281 U.S. 432 (1932).

¹² What appears to be the earliest ancestor of section 301(a) is the Act of March 26, 1790, 1 stat. 103, 104, which was an Act to establish a uniform rule of naturalization. See n. 16, *infra*.

Congress.¹³ In any event, however, the recognition or grant of U.S. citizenship is lawful only because this is within the power of Congress under the Constitution.

We see no basis for concluding that the Supreme Court was declaring a due process protection to citizenship granted by a naturalization act that did not extend to citizenship granted by another act.¹⁴

The Government argues in the alternative that even if congressional power to enact conditions on citizenship is limited by due process, section 301(b) contains reasonable conditions and is, therefore, constitutional. It is urged that section 301(b) is simply a reasonable way

¹³ Article I, § 8 authorizes Congress "to establish a uniform Rule of Naturalization." We need not here decide whether there exists an implied power in foreign relations that would justify legislation like that before us. See Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U.Pa. L.Rev. 903 (1959). Other possibilities exist for justifying congressional legislation to define citizenship. The term "naturalization" appears in the text of the Constitution without definition. The need for explication may well serve to sustain legislation. Compare *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

¹⁴ We do not think a contrary view was intended by Justice Black's majority opinion in *Afroyim*, that

the [Fourteenth] Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. 387 U.S. at 262.

See also Justice Warren's dissent in *Perez v. Brownell*:

The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this priceless right is immune from the exercise of arbitrary governmental powers.

356 U.S. at 77-78.

It is hardly consistent with the farreaching holding of *Afroyim* to attribute to Justice Black's language an intention to leave unprotected a broad class of citizens. The holding is case in broad terms and draws no distinction among types of citizenship. See *Afroyim v. Rusk*, 387 U.S. at 267-68. Moreover, there is no reason to believe that Justice Black meant to vary settled doctrine that due process protects persons.

of assuring that children of hybrid origin give some affirmative indication of desiring to be part of our society as well as avail themselves of our protection and the opportunity to come to this country whenever it proves expedient.¹⁵ Our attention is directed to the background and legislative history of section 301 which, according to the Government, reveals that the purpose of subsection (b) of § 301 is to assure that these children of mixed allegiance have some connection to the state that is offering them its protection and other benefits of citizenship.¹⁶

¹⁵ Compare *Perkins v. Elg*, 307 U.S. 325 (1939), approving by implication an election requirement for persons who bear dual citizenship; see also *Savorgnam v. United States*, 338 U.S. 491 (1950), holding that voluntary naturalization in a foreign state is a valid basis for expatriating an American citizen, even though there was no desire or intention or awareness that the act of naturalization would operate to divest citizenship. For a discussion of problems arising out of dual nationality, see generally Scharf, *A Study of the Law of Expatriation*, 38 St. Johns L.Rev. 251, 271-75 (1964).

¹⁶ Section 301 can be traced to early legislation, dating back to the infancy of the Republic. As early as 1790 Congress provided for the transmission of citizenship by descent. The first such statute was framed as a limitation. "[T]he right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, 1790, 1 Stat. 103, 104. That section was reenacted and finally codified as § 1993 of Revised Statutes. The 1855 Act was a response to an 1854 article, criticizing the earlier formulations for not providing citizenship for those children of American paternity who were born abroad. See Binney, 2 Amer. Law Reg. 193; see also 2 Kent Commentaries 14. In 1934 Congress eliminated the obvious inequity of extending the benefit of citizenship to only those children with paternal ties to the United States. See 78 Cong. Rec. 7344 (73rd Cong., 2d Sess.). At this juncture Congress also included the five years presence requirement which is now section (b) of the statute. Sec. 1, Act of May 24, 1934, 48 Stat. 797. 1790

The forerunner of subsection (b) was Section 6, Act of March 12, 1907, 34 Stat. 1228-29, which provided:

That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of

The Government's contention is not without appeal, and we have pondered the matter carefully. There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.¹⁷ We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant.¹⁸ The broad teaching of *Afroyim* and *Schneider* is that once American citizenship has been recognized or conferred, Congress may not remove the

this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

¹⁷ We recognize that "jus sanguinis" may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent. Yet we are not confronted with the specter of generations of child emigres who will return to this country to claim citizenship. Section 301(a)(7) itself requires that a parent have lived in the United States ten years as a prerequisite to transmitting citizenship to a foreign-born child.

¹⁸ After argument was heard in this case the Attorney General promulgated a Department ruling setting forth the procedure that would be followed in expatriation cases after *Afroyim v. Rusk*. The gist of the memorandum is that each case will be taken on an individual basis to ascertain whether the individual involved actually intended to relinquish his American citizenship, assuming he puts the question of intent at issue. Since the new procedure "does not necessarily apply to the loss of U. S. citizenship acquired as a result of birth abroad to a citizen parent or parents," we have no occasion to consider the legal significance or soundness of the Department ruling, which appears at 34 Fed. Reg. 1079 (January 23, 1969).

status; it is for the citizen to abandon his citizenship voluntarily.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED: DEFENDANT'S CROSS-MOTION IS DENIED.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
United States Circuit Judge

/s/ Harold Leventhal
HAROLD LEVENTHAL
United States Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH, JR.
United States District Judge

Washington, D. C.

February 28, 1969

LEVENTHAL, Circuit Judge, concurring: I add to the opinion I have written for the court a few words that help me place this case in perspective.

We did not have before us in this case a statute that set conditions as a prerequisite for the grant of citizenship. Therefore we did not have occasion to consider to what extent Congress could impose such conditions and what kind of conditions, if any, it could impose. My own assumption is that Congress can impose reasonable conditions that must be met before citizenship is recognized.¹ But that is not the course that Congress wanted

¹ While Congress would have wide latitude in drafting a condition precedent to its grant of citizenship, such conditions would have to comply with the fundamental requirements of equal protection and due process. *Compare* French, *Unconstitutional Conditions: An Analysis*, 50 Geo. L.J. 234 (1961).

to follow here. It wanted the child beneficiary governed by § 301(a)(7) to be a citizen at birth, with advantages of United States diplomatic protection and other benefits of citizenship, and perhaps with the corollary opportunity to resist citizenship claims of other countries.²

Nor were we required to consider a statute in which residence abroad was not established as an operative fact terminating citizenship, but was given significance only as an evidentiary fact indicative of a voluntary relinquishment of citizenship.³

/s/ Harold Leventhal
HAROLD LEVENTHAL
United States Circuit Judge

² See Borchard, *Diplomatic Protection of Citizens Abroad* § 200, at 462.

³ Compare Chief Justice Warren's dissent in *Perez v. Brownell*, which states that "certain voluntary conduct results in an impairment of the status of citizenship," 356 U.S. at 69, and that "United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country." 356 U.S. at 73; compare also Justice Black's concurring opinion in *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958), where he noted, "Although Congress may provide rules of evidence for [determining when there has been voluntary relinquishment], it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. [Citation omitted.] Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship."

JUDGMENT

Bellei v. Rusk, Secretary of States
Civ. Act. 3002-67

In accordance with our memorandum opinion and order of February 28, 1969, it is hereby adjudged, declared and decreed:

(1) That Section 301 (b) of the Immigration and Naturalization Act, 8 U.S.C. § 1401 (b) is unconstitutional; and,

(2) That plaintiff is a citizen of the United States and is entitled to all the rights and privileges appertaining to a citizen of the United States.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
Circuit Judge

/s/ Harold Leventhal
HAROLD LEVENTHAL
Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH
District Judge

Washington, D. C.

May 22, 1969

SUPREME COURT OF THE UNITED STATES

No. 179, October Term, 1969

WILLIAM P. ROGERS, Secretary of State, APPELLANT

v.

ALDO MARIO BELLEI

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

October 13, 1969

